Public Prosecuter v Zainuddin bin Adam

HIGH COURT (KOTA KINABALU) — NO KK-42–37 OF 2011
DAVID WONG J
20 APRIL 2012

Criminal Procedure — Sentence — Appeal against sentence — Statutory rape — Two years imprisonment and one stroke of rattan — Whether excessively inadequate for such offence — Whether appellate interference necessary

The respondent was charged with statutory rape and sentenced to two years of imprisonment and one stroke of the rattan. In determining the sentence to be handed down to the respondent, the trial judge took into consideration the fact that the respondent was a first offender with a good record prior to the incident, that the respondent had pleaded guilty to the charge, that the respondent was genuinely remorseful and wanted to marry the victim, that the sexual act was consensual. The trial judge also took into consideration the prosecution's plea for a deterrent sentence. This was the prosecution's appeal against that sentence. The prosecution submitted that the sentence was excessively inadequate for such an offence.

Held, dismissing the appeal:

(1) It is trite law that sentencing is a discretionary matter for the judge and how it ought to be exercised was linked to the peculiar circumstances of each case. As such, the appellate court would only intervene when the trial judge had taken into consideration irrelevant matters in reaching her decision. In the present appeal it was found that the trial judge had taken into consideration valid matters. It could not be ignored that the sexual act was consensual and that it had resulted in a child, whose welfare ought to be taken into account. The respondent, whom the trial judge found had repented for committing the offence, would have suffered from his incarceration in prison and also any more time spent in prison would not be in the interest of the child (see paras 5–7).

(2) Further, in the present age of the internet, in which the values of society have changed rapidly, the court could not assume that the 15-year old victim was naive. There was also no evidence before the court that imposing a heavy sentence would reduce this sort of offence (see para 8).

[Bahasa Malaysia summary

Responden didakwa dengan rogol statutori dan dihukum dua tahun penjara dan satu sebatan rotan. Dalam menentukan hukuman untuk dikenakan

kepada responden, hakim perbicaraan mengambil pertimbangan fakta bahawa responden adalah pesalah kali pertama dengan rekod baik sebelum insiden tersebut, bahawa responden telah memplid bersalah kepada tuduhan tersebut, bahawa responden adalah benar-benar menyesal dan hendak mengahwini mangsa, bahawa perbuatan seksual adalah sepersetujuan. Hakim perbicaraan juga mengambil pertimbangan plid pendakwaan untuk hukuman berat. Ini adalah rayuan pihak pendakwaan terhadap hukuman tersebut. Pihak pendakwaan berhujah bahawa hukuman tersebut adalah tidak wajar untuk kesalahan sedemikian.

Diputuskan, menolak rayuan:

(1) Adalah undang-undang nyata bahawa hukuman adalah perkara budi bicara untuk hakim dan bagaimana ia patut dilaksanakan dikaitkan dengan keadaan khusus setiap kes. Oleh itu, mahkamah rayuan hanya akan campur tangan apabila hakim perbicaraan telah mengambil pertimbangan perkara-perkara yang tidak relevan dalam mencapai keputusan beliau. Dalam rayuan ini ia didapati bahawa hakim perbicaraan telah mengambil pertimbangan perkara-perkara yang sah. Ia tidak dapat diabaikan bahawa perbuatan seksual adalah sepersetujuan dan ia menyebabkan kanak-kanak dilahirkan, yang kebajikannya patut diambil kira. Responden, yang mana hakim perbicaraan mendapati telah bertaubat kerana melakukan kesalahan tersebut, akan menderita daripada pemenjaraannya dan juga apa-apa masa berlebihan dihabiskan di dalam penjara tidak akan memberi manfaat kepada kanak-kanak tersebut (lihat perenggan 5–7).

(2) Selanjutnya, dalam zaman internet ini, yang mana nilai-nilai masyarakat telah berubah dengan cepat, mahkamah tidak dapat menggangap bahawa mangsa yang berumur 15 tahun adalah naif. Juga tidak terdapat keterangan di hadapan mahkamah bahawa dengan mengenakan hukuman berat akan mengurangkan kesalahan jenis ini (lihat perenggan 8).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3553–3615.

Uma Devi (Deputy Public Prosecutor, Federal Attorney General Chambers) for the prosecution.
Defendant in person.

David Wong J:

[1] This is an appeal by the learned DPP against the sentence handed down

by the sessions court judge in respect of a charge of statutory rape by the respondent. The respondent was sentenced to two years imprisonment from 23 December 2010 and one stroke of the rattan.

[2] In determining the sentence to be handed down, the learned sessions court judge took into consideration of the folio wings:

(a) the respondent was a first offender and had a good record prior to the incident;

(b) the respondent had pleaded guilty to the charge which saved much time and costs to all concerned;

(c) the respondent is genuinely remorseful for committing the offence and had wanted to marry the victim;

(d) the sexual act was consensual with the victim; and

(e) the DPP's plea for a deterrent sentence citing the rampancy of the offence, protection of young girls, sexually transmitted disease and unwanted pregnancies.

[3] The learned sessions court judge concluded as follows:

> I believe young lovers will engage in sexual activities regardless of disapproval from parents, the public or the law and sentencing the accused to a long spell in prison will not serve much purpose.

[4] The learned DPP's submission in substance is that the sentence is excessively inadequate for such an offence and had referred to various cases to demonstrate that such sentence is not consistent with those cited cases. I have read those cases with care and in coming to my decision I have kept in my mind what has been said by the learned judges there.

[5] It is trite law that sentencing is a discretionary matter for the judge and how it is to be exercised is linked to the peculiar circumstance of each case and it is with that principle I approach in this appeal. Further Parliament has not set any minimum sentence to be given by the court which simply emphasises the discretion possessed by the court in the realm of sentencing. Be that as it may, the fact that the law prescribes a maximum of 20 years shows that it is a serious offence.

[6] In an appeal of this nature, the appellate court will only intervene when the learned sessions court judge had taken into consideration of irrelevant matters in reaching her decision or that the sentence is manifestly inadequate. I have set out what she had taken into account and it is my view that those considerations are valid ones. She had also expressed the view that long

incarceration in prison would not solve or deter young lovers from having sex. There is some merit in what she says bearing in mind that in this day and age of internet where with free flow of information from cyber space, young people are exposed to things which the older generation could not have imagined. Such exposure had no doubt also made the art of parenthood that much more difficult in dealing with such social issues. In some cases, it had made it impossible. The value of society changes as each year passes by and because of such change, it of course has made the job of court that much more difficult especially on such issues.

[7] Reverting to the factual matrix in this appeal, I cannot ignore the fact that the sexual act is consensual and as a result of the indiscretion, a child has been brought into this world who, like it or not, has the respondent as the natural father. His welfare must be taken into account and the sooner the child gets to know his father, the better it is. He has repented as found by the learned sessions court judge and I am sure that he had also suffered from his incarceration in prison and any more time in prison in my view would not be in the interest of the child. It may be that the respondent will be able to convince the victim and her parent that the respondent, the victim and the child can be one family.

[8] As for the submission that the victim is naive at the age of 15 years, the court cannot assume that as there is no evidence before the court. As stated earlier, young people are exposed to a lot of things which have made them more knowledgeable. The prosecution in future should at least submit some evidence of naivety when there is a guilty plea by would be accused. Like I said earlier, the age of internet has made the world a different one to that of say ten years ago and what we have assumed before about the intellectual ability of young people may be valid anymore. There is also no evidence before the court that imposing a heavy sentence would reduce this sort of offence.

[9] For all the reasons stated above, I find that the sessions court judge had not erred in her consideration or that the sentence passed is manifestly inadequate.

[10] Accordingly I dismiss the appeal.

Appeal dismissed.

Reported by Ashok Kumar